LIQUOR LIABILITY

L. Jeffrey Meehan
Doherty, Wallace, Pillsbury
and Murphy, P.C.
1414 Main Street
Springfield, MA 01144
(413) 733-3111
(413) 734-3910 (fax)
ljmeehan@dwpm.com

I. STATUTES PERTINENT TO LIQUOR LIABILITY

Massachusetts General Laws Chapter 138 Section 34:

This statute prohibits a licensed purveyor of alcoholic beverages from furnishing alcoholic beverages to an individual less than 21 years of age. It also prohibits one who is not a commercial purveyor of alcoholic beverages from procuring alcoholic beverages for a person under 21 years of age in any licensed establishment. A violation of this statute provides for both monetary fines and imprisonment. There is an exception for the procurement of alcoholic beverages on licensed premises for a person under the age of 21 years who is the child, ward or spouse of the person procuring the beverages. There is no liability for one who procures alcoholic beverages for a person under the age of 21 years who is the child or grandchild of the person providing the beverages and where it occurs on premises or property owned by that person.

Massachusetts General Laws Chapter 138 Section 34A

This statute provides criminal sanction for anyone under the age of 21 years who attempts to purchase alcoholic beverages, whether directly or through a third party or by means of falsification of identification as to his age.

Massachusetts General Laws Chapter 138 Section 34B

This statute provides for a system for the issuance of liquor purchase identification cards for individuals who have attained the age of 21 years and who do not hold a valid driver's license.

Massachusetts General Laws Chapter 138 Section 34D

This statute requires that a commercial distributor of alcoholic beverages post on the premises a notice describing the penalties for operation of a motor vehicle while under the influence. Those establishments which sell alcoholic beverages to be

consumed off the premises must also post a notice describing the penalties for operating a motor vehicle with an open container of alcohol.

Massachusetts General Laws Chapter 138 Section 41

This statute provides that the delivery of alcoholic beverages to certain premises, excepting a private dwelling, shall be presumed to be a sale of said beverages.

Massachusetts General Laws Chapter 138 Section 64

This statute provides for the suspension or revocation of a license to sell alcoholic beverages upon satisfactory proof that the licensee, among other causes, has sold beverages to an individual under the age of 21 years.

Massachusetts General Laws Chapter 138 Section 64A

A licensing authority, upon a finding that the licensee has served alcoholic beverages to a person less than 21 years of age or to an intoxicated person on multiple occasions may impose sanctions, including a requirement that the licensee provide a certificate of insurance for liquor liability for the licensee to monetary limits of not less than $100,000 per person and $200,000 to all persons.

Massachusetts General Laws Chapter 138 Section 64B

In the case that liquor liability insurance is required precedent to the modification, reinstatement or renewal of a license, the licensee must disclose to the insurer that the policy of insurance is required by the licensing authorities and provide the liquor liability insurer with the mailing address of the licensing authority. It shall direct the insurer to include said authorities as recipients of any notice of termination or alteration of the policy of insurance as required by Massachusetts General Laws Chapter 175.

Massachusetts General Laws Chapter 138 Section 68

The mayor of a city or selectmen of a town may, in cases of a riot or great public excitement, order licensees not to sell or otherwise distribute alcoholic beverages on the licensed premises for a period not exceeding three days.

Massachusetts General Laws Chapter 138 Section 69

This statute prohibits the sale or delivery of alcoholic beverages on licensed premises to an intoxicated person.

Massachusetts General Laws Chapter 231 Section 60J

This statute requires any action asserting liability on the basis of the provision of alcoholic beverages must be commenced in the superior court. The plaintiff must file with his complaint, or not more than ninety days thereafter, an affidavit setting forth sufficient facts to raise a legitimate question of liability appropriate for judicial determination. The parties are permitted to make motions for summary judgment. If summary judgment is decided adversely to the plaintiff and he elects to appeal, he must file a bond of $2,000 for each defendant with the clerk of the appellate court. If the appellant does not prevail, that bond will be payable to the appellee/defendant for costs assessed and attorneys' fees.

The ninety day period for the filing of the affidavit may be extended by the court even after expiration of the period. Croteau v. Swansea Lounge, Inc., 402 Mass. 419 (1988). Failure to file the statutory affidavit subjects the complaint to dismissal. Pucci v. Amherst Restaurant Enterprises, Inc., 33 Mass. App. Ct. 779 (1992).

Massachusetts General Laws Chapter 231 Section 85T

This statute provides in essence that the commercial distributor of alcoholic beverages shall not be liable for personal injuries, property damage or consequential damages caused by the service of alcoholic beverages to an intoxicated person who injures himself, unless the injured party is able to demonstrate that the provider of alcoholic beverages acted in a willful, wanton or reckless manner. It was the legislature's intent to protect commercial vendors from suits by patrons who injure themselves through voluntary intoxication. Manning v. Nobile, 411 Mass. 382, 387 (1991). (Note: This statute protects the provider of alcoholic beverages with respect to claims made by the individual whose consumption of those beverages is causally related to his injuries or harm, and will not protect the provider of alcoholic beverages for injuries or damages inflicted by the consumer of those beverages upon third parties.)

Massachusetts General Laws Chapter 90 Section 24

This is the drunken driving statute and provides, in part, that a driver operating a motor vehicle on a public way with a blood alcohol content of .08 or greater (if there is a breathalyzer or blood test) or operates a motor vehicle on a public way while under the influence of intoxicating liquor (no evidence by blood test or breathalyzer) or marijuana (and/or other controlled substances), shall be punished…

A violation of a statute regulating the use of alcoholic beverages, even one providing for criminal penalties, does not constitute an independent grounds for civil liability and does not constitute negligence per se. Instead, a violation of such a statute may be construed as evidence of the defendant's negligence as to all consequences for which the statute was intended to prevent. Bennett v. Eaglebrook Country Store, 408 Mass. 355, 358-359 (1990).

This statute, requiring proof of willful, wanton or reckless misconduct against a commercial distributor of alcoholic beverages wherein the consumer of those beverages

voluntarily becomes intoxicated and injures himself is inapplicable to wrongful death cases. A commercial distributor of alcoholic beverages may be held liable to the estate of an individual who becomes voluntarily intoxicated and whose intoxication results in his death on a showing of ordinary negligence. Also, a commercial vendor of alcoholic beverages to a minor may not assert General Laws Chapter 231 Section 85T as a defense. Tobin v. Norwood Country Club, Inc., 422 Mass. 126, 136 (1996).

Sections 24 and 69 of General Laws Chapter 138 are intended to protect the general public as well as the purchaser of the forbidden alcoholic beverages. Michnik-Zilberman v. Gordon Liquors, Inc., 14 Mass. App. Ct. 1533, 1538 (1982).

Chapter 204 of the Code of Massachusetts Regulations regulates licensed commercial vendors of alcoholic beverages and proscribes certain practices in the dispensation of these beverages.

II. LIABILITY OF A COMMERCIAL DISTRIBUTOR OF ALCOHOLIC BEVERAGES

In many complaints seeking monetary compensation for injury or death caused, at least in part, by the distribution of alcoholic beverages, reference is made to Massachusetts General Laws Chapter 138 Section 69. This makes it unlawful to distribute alcoholic beverages to a person who is intoxicated. The statute has been amended to delete some archaic language with respect to a "known drunkard". It still has the same force and effect. The commercial provider of alcoholic beverages to a person who is intoxicated can be held liable by way of monetary damages for all injuries and harm resulting from the service of intoxicated beverages. It has been observed that the courts of Massachusetts have found it easier to impose a duty of care upon a licensed purveyor of alcoholic beverages than upon a social host. McGuiggan v. N.E. Telephone & Telegraph Co., 398 Mass. 152, 157 (1986).

The negligent provision of alcoholic beverages to an intoxicated individual may result in liability whether the injury is sustained on the premises of the defendant or on the public way. Adamian v. Three Sons, Inc., 353 Mass. 498 (1968). (Service of excessive amounts of alcoholic beverages to a patron who became intoxicated and was involved in a fatal collision shortly after departing the defendant's tavern.) In that decision, the SJC remarked that the statute was for the purpose of safeguarding not only the intoxicated person but also members of the general public.

Given the prevalence of the use of motor vehicles in modern society, even without evidence of such things as a parking lot on a premises or proximity to a highway, a jury may infer that a tavern keeper of ordinary caution would recognize that an intoxicated person may drive an automobile and thus create a risk of injury to highway travelers. Cimino v. Milford Keg, Inc., 385 Mass. 323, 331 (1982). (The defendant served alcoholic beverages to a patron who was intoxicated and who subsequently struck and killed a child/pedestrian after leaving the defendant's café.) A tavern keeper does not owe a duty to decline to serve alcoholic beverages to an intoxicated person unless the tavern keeper knows, or reasonably should have known, that the patron is intoxicated. Id. at 327.

A jury is ultimately asked to decide whether the service of alcoholic beverages by the tavern keeper to an intoxicated patron was a failure to use that degree of care which a tavern keeper of ordinary prudence would have used under the same or similar circumstances. Id. at 331. The plaintiff is not obligated to establish by special evidence any circumstances which would notify the tavern that an intoxicated customer would be driving. This can be inferred from the realities of modern life. Id. at 332.

Recovery can also be had by a tavern patron who voluntarily consumes excessive amounts of alcoholic beverages and injures himself. O'Hanley v. Ninety-Nine, Inc., 12 Mass. App. Ct. 64 (1981). In the O'Hanley case, the plaintiff, after consuming 15 bottles of beer and six martinis, fell while attempting to dance on the bar, sustaining an injury to his leg. The Appeals Court reversed the decision for summary judgment in

favor of the tavern, and observed that serving liquor to one who is already drunk may enhance the possibility of irrational behavior, and that it is well known that the consumption of liquor impairs an individual's sense of balance. The jury would be able to infer that after the consumption of that amount of alcoholic beverages, the plaintiff would have displayed outward manifestations of intoxication. The Appeals Court decided that the plaintiff was entitled to have his case decided by a jury.

Presently, as a practical matter, a plaintiff in this posture faces the significant hurdle pursuant to Massachusetts General Laws Chapter 231 Section 85T (enacted after the O'Hanley decision) of proving that the distributor of alcoholic beverages was, not merely negligent, but engaged in willful, wanton or reckless conduct. Should the intoxicated person, however, injure a third party, such a claimant would only have to prove negligence on the part of the tavern keeper and not willful, wanton and reckless conduct. Indeed, a tavern keeper who sells alcoholic beverages to an intoxicated person or to a minor, may be held civilly liable to a third party who is injured as a result of the customer's operation of a motor vehicle while intoxicated. Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 816 (1979). The plaintiff must show a causal relationship between the intoxication and the accident. Id. at 817. G.L.c. 231 §85T is not applicable to wrongful death actions only personal injury suits. Zeroulias v. Hamilton American Legion, 46 Mass. App. Ct. 912 (1999).

Liability of the commercial vendor of alcoholic beverages for injuries caused by an intoxicated customer is not confined to a tavern or restaurant, but may be asserted against a retail liquor store. Michnik-Zilberman v. Gordon Liquors, Inc., 14 Mass. App. Ct. 533, 539 (1982). (The case involved the sale of beer to a youthful-appearing minor without checking his identification card, who subsequently became intoxicated and struck and killed a bicyclist while driving an automobile.) The statutes prohibiting the distribution of alcoholic beverages to an intoxicated person (G.L. c. 138 § 69) and to a minor under the age of 21 years (G.L. c. 138 § 34) were "intended to preclude persons known to be incapable of responsible judgment from further impairment of their limited abilities by preventing their consumption of alcoholic beverages." Id. at 138. The courts

have long recognized "the special susceptibilities of minors, and the intensification of otherwise inherent dangers when persons lacking in maturity and responsibility partake of alcoholic beverages." Id. at 538. Thus, the operator of a retail liquor store, as a tavern keeper, has a duty to refuse to sell, or otherwise distribute, alcoholic beverages to people who they know, or reasonably should know, are intoxicated or minors, or both. Id. The sale of alcoholic beverages to a sober minor violates the statute and is evidence of the vendor's negligence. It is the "sale rather than the consumption which may be found to constitute the negligent act." Id. at 539.

Indeed the legislature has approved two cards, a motor vehicle operator's license and a liquor identification card, upon which vendors of alcoholic beverages may reasonably rely to ascertain the age of youthful appearing customers. G.L. c. 138 §34B and Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 11 (1983). Thus, a vendor who fails to exercise due care and sells alcoholic beverages to a minor will be held accountable for all proximately caused injuries. Id. at 11. Evidence of the minor purchaser's appearance is relevant and admissible. It is unnecessary that the vendor of alcoholic beverages foresee the actual manner in which the harm will occur. The vendor may protect itself by maintaining a record of the identification card numbers as well as the name, address and age of any person with a youthful appearance to whom it distributes alcoholic beverages. Id. at 11.

Apart from the sale of alcoholic beverages to a minor, the liability of a commercial distributor of alcoholic beverages to an intoxicated person turns on the appearance of the person with reference to sobriety at the time of the sale. The tavern keeper will not be held liable for the sale of liquor to an intoxicated patron unless the tavern keeper knew or reasonably should have known that at the time of the sale the patron was intoxicated. Vickowski v. Polish American Citizens Club of the Town of Deerfield, Inc., 422 Mass. 606, 609 (1996). (The sale of 4 or 5 beers to a regular customer with a stolid affect who was found to exhibit signs of intoxication at the scene of an accident where his vehicle struck a pedestrian 30 minutes later.) In other words, there must be some evidence offered by the plaintiff to demonstrate that at the time of the service of

alcoholic beverages the patron was obviously intoxicated. Evidence of this may be exhibited by the classical symptoms of imbalance, bloodshot eyes, difficulty in speaking, overly affectionate or combative behavior, or a loss of rationality. To support a finding of liability, the service of alcoholic beverages must be made after the patron began exhibiting obvious signs of intoxication. Id. at 610-611. There is no liability unless the tavern keeper knew or reasonably should have known that the patron was intoxicated. The courts have been "reluctant to accept evidence of subsequent, obvious intoxication as a surrogate for evidence of the patron's demeanor at the relevant time." Id. at 612. Thus, a display of signs of intoxication at an accident scene, after the sale of alcoholic beverages and the departure of the patron, is not necessarily sufficient to support the conclusion that the patron appeared intoxicated at the time of the last sale of a beverage.

In Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630 (1993), a large patron assaulted and inflicted serious injury upon two fellow patrons in a parking lot after all had left the defendant's tavern. Despite the assailant's admitted consumption of eight containers of beer, the plaintiffs failed in their proof that he displayed signs of intoxication at the time of the last sale. The allowance of a motion for summary judgment for the tavern keeper was sustained on appeal. The courts have recognized the possible delay in the impact of the consumption of alcohol, and the "unknown effect on a patron of the last drink served to him by [a tavern keeper]". Vickowski, supra at 612.

However, in the case of Gottlin v. Graves, 40 Mass. App. Ct. 155 (1996), the court permitted evidence of obvious intoxication by a patron of a tavern displayed at the scene of a motor vehicle accident only 20 minutes after departure from the tavern to support a finding that at the time of the last sale of an alcoholic beverage to the driver, he would have displayed obvious signs of intoxication. Under certain circumstances, juries are allowed, usually with the assistance of expert testimony, to consider evidence of the blood alcohol level of the tavern patron in making a determination as to whether he would have displayed signs of obvious intoxication when last served alcoholic beverages. Commonwealth v. Capalbo, 308 Mass. 376, 380 (1941).

Yet, on occasion, in the sound discretion of the trial judge, An expert such as a toxicologist has been precluded from testifying as to the probable manifestations of intoxication as exhibited by a tavern patron whose blood was tested for alcohol after the subject accident. Kirby v. Morales, 50 Mass. App. Ct. 786, 792 (2001). In that particular case, the drunken driver had visited a number of taverns and had consumed alcoholic beverages in parking lots as well, making his itinerary vague and clouding the issue of where, and at what point, he exhibited signs of obvious intoxication and was still provided with alcoholic beverages during a long evening of drinking.

Liability for service of alcoholic beverages to a minor does not require hand-to-hand service. In the decision of Tobin v. Norwood Country Club, Inc., 422 Mass. 126 (1996), a commercial vendor of alcoholic beverages was held responsible for the death of a minor who attended a birthday party to which both adults and adolescents were invited. The mere consumption of alcoholic beverages on the premises of a tavern does not create a duty to that minor, or to those harmed by the results of the minor's consumption of alcoholic beverages. However, where the commercial establishment sold alcohol to a minor, liability will be imposed, even absent actual "hand to hand" service. In the Tobin case, the bartender served multiple drinks simultaneously to adults which were obviously to be consumed by others, beside the purchaser. Also, an adult purchaser, on occasion, engaged the assistance of minors to carry the drinks from the bar to the tables.

It was decided that the vendor of alcoholic beverages, being in the business of supplying a substance which creates a well-established risk, has the experience and the ability to take steps to minimize that risk. Id. at 135. Here, the minor, after becoming intoxicated and argumentative, wandered onto the highway and was struck and killed. The court again recognized that Massachusetts General Laws Chapter 138 Section 34 forbids the service of alcoholic beverages to minors because they are particularly susceptible to the effects of alcohol, and less able to cope with those effects, and to make decisions concerning safety in a variety of scenarios. Id. at 136. Thus, even though there was no direct service of alcoholic beverages to the minor decedent, the

SJC concluded that there was sufficient evidence so that the employees of the country club should have appreciated that the alcohol being furnished was being consumed by minors, and because they had the financial incentive to sell the alcoholic beverages; the experience to monitor consumption closely; and the ability to procure liability insurance in the event of an injury, the defendant would be held accountable for the minor's death. Similarly an adult, but underage driver (between the ages of 18 and 21 years) who voluntarily becomes intoxicated and injures himself need only prove that the commercial vendor was negligent to recover damages. Nunez v. Carrabba's Italian Grill, 448 Mass. 170 (2007).

However, if the commercial defendant did not provide alcoholic beverages, then it cannot be held accountable for the untoward results of intoxication. See Dhimos v. Cormier, 400 Mass. 504, 506 (1987) (convenience store operator held not responsible for stabbing arguably as a result of the intoxication of the assailant in the parking lot where teenagers customarily gathered as the defendant had no role in the acquisition or consumption of alcoholic beverages). In the case of O'Gorman v. Antonio Rubinaccio & Sons, Inc., 408 Mass. 768 (1990), a driver entered the defendant's tavern obviously drunk. The proprietor took it upon himself to take the driver's keys and declined to serve him alcoholic beverages, serving him food instead. After two hours, the proprietor felt he could no longer hold the operator's keys and released them. Shortly after departing the defendant's tavern, the operator was involved in a fatal motor vehicle accident. The SJC concluded that because the defendant tavern had not supplied the alcoholic beverages leading to the motorist's intoxication, it had no duty to prevent him from harming other travelers using the highway.

In the decision of Douillard v. L.M.R., Inc., 433 Mass. 162 (2001), summary judgment in favor of a tavern operator was affirmed. The court restated the rule that a commercial vendor of alcoholic beverages is not required to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron was intoxicated. It remains the plaintiff's burden to demonstrate by evidence that the patron's intoxication was apparent at the time of the service of

alcoholic beverages. Id. at 164-165. (In Douillard, the companions of the motor vehicle operator who caused serious injury while operating his vehicle after leaving the defendant's tavern testified that he did not appear intoxicated.)

Evidence of intoxication at a later point in time with elevated blood alcohol levels does not support a finding that the consumer of alcoholic beverages displayed signs of intoxication when those beverages were served to him. The court remarked that the impact of the consumption of alcohol is often delayed, and that the effect of alcohol on the population varies considerably from one person to the next. The Douillard decision reinforces the proposition that the ability of an expert, such as a toxicologist, to describe the expected manifestations of intoxication based upon subsequent blood alcohol levels is only admissible in the sound discretion of the trial judge, and cannot be relied upon exclusively to support a claim for negligent dispensation of alcoholic beverages.

In the case of Christopher v. Fathers' Huddle Café, Inc., 57 Mass. App. Ct. 217 (2003), a tavern was held responsible for the death of a patron who was pursued onto public way in an altercation with other patrons. Some of the pursuers who chased the decedent into the street were minors and had been served alcoholic beverages in violation of G.L.c. 138 § 34. The court pointed out that the duty to refrain from providing alcoholic beverages to minors is not dependent on whether they have the appearance of being intoxicated. The susceptibility of minors to the effects of alcohol and the lack of maturity in making decisions under the influence of alcohol is an established fact. Liability in that case was also grounded upon the fact that the defendant's doorkeeper observed the escalation of hostilities and the beginning of the combative behavior without attempting to notify the police. The hostilities made infliction of harm foreseeable and in failing to summon the police, the doorkeeper violated the tavern's own written and oral policies which required the doorman to call for assistance in that situation. Here, a commercial vendor of alcoholic beverages was held accountable for the death of a patron on the adjacent public way because of the service of alcoholic beverages to underage assailants, and also for failing to take appropriate steps to protect patrons from a foreseeable assault.

III. SECURITY CLAIMS AGAINST COMMERCIAL VENDORS OF ALCOHOLIC BEVERAGES

The duty of a purveyor of alcoholic beverages to protect patrons does not require notice of intoxication, but may arise when the conduct of a antisocial or boisterous patron alerts the tavern keeper, or its employees, that combat and resultant harm is imminent. Kane v. Fields' Corner Grille, Inc., 341 Mass. 640, 641 (1961). In the landmark decision of Carey v. New Yorker of Worcester, Inc., 355 Mass. 450 (1969), a tavern was held accountable for one patron fatally shooting another on the premises. In that instance, the shooter was under age and had displayed for a significant period of time signs of obvious intoxication. The shooter had behaved boisterously in the tavern on prior occasions, and that evening was described as "absolutely drunk". The SJC remarked that it was not required that the plaintiff prove that the defendant tavern anticipate the precise method of the assault. It noted that the service of liquor to an individual who was already drunk may enhance that person's aggressive demeanor to make "any irrational act foreseeable". Id. at 453. Thus, recovery against commercial vendors of alcoholic beverages because of assaultive behavior by an intoxicated patron on a customer is a familiar situation. Wood v. Ray-Al Café, Inc., 349 Mass. 760, 766 (1965).

Liability is not dependent upon an antagonistic motivation on the part of the intoxicated patron. In the case of Sweenor v. 162 State Street, Inc., 261 Mass. 524 (1972), a boisterous patron was continued service of alcoholic beverages after it became obvious that he was thoroughly intoxicated. Another patron attempted to prevent the drinker from falling from a barstool, and the good samaritan sustained a fractured leg when the drunk fell on him. The court said, quoting from the Restatement of Torts Second:

> The defendant, as the operator of a restaurant and bar, was in possession of real estate open to the public for business purposes. It owed a duty to a paying patron to use reasonable care to prevent injury to him by third persons, whether their acts were accidental, negligent or intentional. Id. at 527.

The court noted that in addition to increasing aggressive behavior, the service of alcoholic beverages has a tendency to impair the consumer's sense of balance.

Not all service of alcoholic beverages to intoxicated persons requires a finding of liability. In the matter of Westerback v. Harold F. LeClair Co., Inc., 50 Mass. App. Ct. 144 (2000), the Appeals Court segregated the two major areas of liquor liability into those scenarios wherein a drunken customer on the premises inflicts injuries on others or on himself; and the other where a drunken patron inflicts injuries on others by negligent operation of a motor vehicle after leaving the tavern. In this case, the plaintiff became intoxicated, arguably at the defendant's tavern, and was subsequently raped while off the tavern premises by third parties who had no connection to the tavern. Recognizing that liability had been found for a owner of commercial premises for injuries sustained by patrons on those premises, or just outside the premises, the courts have remarked that in those instances, the injury to the patron took place in proximity to the premises so that there were circumstances calling for the provision of security by the premises owner. The court in Westerback recognized that the consumption of excessive alcoholic beverages makes a person more vulnerable to assaultive behavior, but the intervening acts of criminals who had no association with the defendant premises owner broke the chain of causation, and prevented recovery against the tavern keeper.

IV. LIABILITY OF AN EMPLOYER WHO ELECTS TO ACT AS A HOST OR SPONSOR

The prototypical claim against an employer for negligent dispensation of alcoholic beverages arises when an employee consumes excessive amounts of alcoholic beverages at the company Christmas party and injures a third party on the public way. The case of Mosko v. Raytheon Co., 416 Mass. 395 (1993) involves the defendant's sponsorship of a Christmas party for employees at a restaurant. While Raytheon partially sponsored the event by paying to reserve the banquet room and to defray the costs of food, the employees purchased their own alcoholic beverages from servers of

the concessionaire. One of the employees became intoxicated at the party and later struck the plaintiff, attempting to change a tire in a highway breakdown lane. The plaintiffs claim that Raytheon should be held vicariously liable for the negligence of its employee who was acting within the scope of his employment while attending the Christmas party. The SJC denied the plaintiff's contentions, citing that the employee was not engaged in work at the time of the occurrence and observing that the party was not conducted on the defendant's premises or during working hours. It also dismissed the plaintiff's contentions with respect to an alleged duty on the part of the employer to prevent its employees from becoming intoxicated at the party and thereby endangering the public. The SJC reemphasized that there is no duty of care imposed when the defendant did not furnish the alcohol to an obviously intoxicated person. But see Commerce Ins.Co. v. Ultimate Livery Service, Inc., 452 Mass. 639 (2008) *infra.*

In the case of Kelly v. Avon Tape, Inc., 417 Mass. 587 (1994), the defendant provided a refrigerator for the use of employees, and was aware that on occasion employees stored beer in the same. One of the employees consumed beer during the course of the work day and became intoxicated. Following the end of his shift, that employee drove in a negligent fashion, injuring the plaintiffs. The SJC concluded with respect to the plaintiffs' contentions regarding a "employee-host liability claim" that there would be no liability with respect to a private defendant who did not actually furnish the alcoholic beverages.

The case of Burroughs v. The Commonwealth, 423 Mass. 874 (1996) arose from the consumption of excessive amounts of alcoholic beverages by a 19-year-old member of the Massachusetts National Guard at a noncommissioned officer's club located in a state armory. The National Guard permitted servicemen to use a portion of the armory building for a club containing a bar, dartboard and pool tables. The platoon sergeant, while off-duty, acted as the bartender for no compensation. The alcohol was provided by the individual Guard members and not by the National Guard itself. The teenage drinker was involved in a fatal automobile accident shortly after his departure from the NCO club. The Court found that the bartender was not carrying on any employment

duty associated with his status in the National Guard and because the National Guard had not furnished the alcoholic beverages leading to the teenager's intoxication, there would be no liability.

Recently the Appeals Court affirmed summary judgment in favor of an employer whose employee, while operating a motor vehicle in an intoxicated state, struck and injured the plaintiff. Lev v. Beverly Enterprises -Massachusetts, Inc., 74 Mass. App. Ct. 413 (2009). The employee had met with a supervisor at a tavern, after completing their shift to discuss work matters. Despite the fact that the employment manual prohibited the consumption of alcoholic beverages on the employer's premises or while conducting business off-site, there was no liability as the employer did not provide the beverages consumed.

V. MISCELLANEOUS ISSUES RELATING TO THE LIABILITY OF A COMMERCIAL VENDOR OF ALCOHOLIC BEVERAGES

The courts of Massachusetts have recognized the theory of recovery against an employer for the negligent hiring of an individual predisposed to combative behavior and querulousness whom the employer can reasonably anticipate will have contact with its customers. In the case of Foster v. The Loft, Inc., 26 Mass. App. Ct. 289 (1988), the defendant, a large entertainment center featuring five bars and catering to young people, retained a bartender who had a criminal record. While the defendant was aware of the employees criminal record, no effort was made to check references or otherwise investigate his background. The bar, in view of its size and clientele, took relatively elaborate measures for safety, including the hiring of two part-time police officers, a number of doorkeepers and other staff. During a late evening, heated confrontation, the employee struck a patron in the face, shattering his orbit and cheekbone. A jury finding in favor of the patron on the basis of a negligent hiring of a dangerous individual was affirmed.

While the creation of written policies by a commercial vendor of alcoholic beverages to be observed employees in the dispensation of those beverages is a

commendable measure, it should be kept in mind that the conduct of the employees who dispense alcoholic beverages in a later liability claim will be measured against those policies. In Michnik-Zilberman v. Gordon's Liquor, Inc., Supra at 13, the failure of a package store clerk to check the identification of a youthful purchaser in violation of the store policy was probative of the defendant's negligence. The establishment of written policies which cannot be realistically adhered to, can undermine the defense of a case.

VI. SOCIAL HOST LIABILITY

In Massachusetts, the landmark case recognizing the tort of social host liability for service of alcoholic beverages is McGuiggan v. New England Telephone and Telegraph Co., 398 Mass. 152 (1986). This action arose out of a high school graduation party in which an 18-year-old was served an initial drink and apparently served himself additional drinks during the course of the evening. Subsequent to his departure from the host's premises, he operated a motor vehicle involved in a fatal accident. The courts said "the risk created by serving liquor to an intoxicated person who is about to operate a motor vehicle is far too apparent to permit the conclusion that a social host's act could not have been the proximate cause of a third person's injury." Id. at 160. In this case, however, the plaintiffs were unable to show evidence of obvious intoxication at the time that the social host served the driver an alcoholic drink. While the court has declined to reverse summary judgment for the social host in this case, it indicated a willingness to impose liability under the appropriate circumstances against social hosts in future actions involving the distribution of alcoholic beverages to an intoxicated guest.

In another claim arising out of a teenage party wherein the homeowner permitted the celebration, but did not provide alcoholic beverages, it was decided that the parent who permits his home to be used for a party but who does not provide alcoholic beverages does not owe a duty to travelers on the highway to supervise a party given by her minor child. Langemann v. Davis, 398 Mass. 166 (1986). In Alioto v. Marnell, 402 Mass. 36 (1988), the parents of a teenage son with a history of alcohol abuse permitted

him to host a party in their home while they were present knowing that alcoholic beverages would be consumed, but on their son's promise that he would not operate a motor vehicle. Predictably, the son broke the promise and was involved in a motor vehicle accident. The court declined to impose liability on the parents as they did not furnish the alcoholic beverages.

In Ulwick v. DeChristopher, 411 Mass. 401 (1991), a teenage in the absence of his parents hosted a "B.Y.O.B." party at the family home. Despite the host's observation of the intoxicated guest continuing to consume alcoholic beverages, who did nothing to prevent that consumption, the court, emphasizing the absence of liability unless the host can control and regulate the supply of liquor, said: "These principles, and the consideration that a duty of care follows from control over the liquor supply, furnish practical limits of potential liability." Recently in the decision of Juliano v. Simpson, 461 Mass. 527 (2012), the S.J.C. revisited the question of a social host's liability for injuries sustained because of the intoxication of an underaged guest when the host did not actually provide the alcoholic beverages, but permitted them to be consumed at her residence by the guest. Despite the language in G.L. c.138 §34 which proscribes furnishing alcohol to a person under the age of 21 years, or allowing an underaged driver to possess alcoholic beverages on premises owned or controlled by the person in Charge; in the context of social host liability a plaintiff is required to prove that the defendant provided the intoxicating beverages.

Even where an adult remains to chaperone a party and establishes a policy of no alcoholic beverages which is later violated by her daughter's guests, the adult was not held liable as, having not provided the intoxicants, she owed no duty to travelers on the highways to supervise a party given by her minor child. Wallace v. Wilson, 411 Mass. 8 (1991). In Manning v. Nobile, 411 Mass. 382 (1991), the plaintiff's employment supervisor hosted a party at a Marriot hotel following a company function at another location. The plaintiff over-imbibed and, while waiting for the driver, elected to drive himself at the conclusion of the evening, suffering an accident which left him in a permanent vegetative state. The claim against Marriot was turned away on the basis

that it did not provide the alcoholic beverages consumed at the party and that pursuant to Massachusetts General Laws Chapter 231 Section 85T, the plaintiff could recover against a commercial vendor for injuries inflicted upon himself as a result of intoxication only if he could show that the commercial vendor was "willful, wanton or reckless". More importantly, the SJC announced that recovery could not be had against a social host who had no duty to prevent an intoxicated guest from injuring himself.

In Cremins v. Clancy, 415 Mass. 289 (1993), a teenage drinking celebration evolved from the defendant's home to his car. However, the underage guest provided his own beer and the host was deemed not responsible to individuals injured in a collision later that evening when the intoxicated guest was operating his own motor vehicle. The mere provision of a setting or atmosphere for the consumption of alcoholic beverages and inebriation, but without the actual provision of those beverages does not give rise to liability.

The distinction between status as an adult and status as an underage drinker was explored in the case of Hamilton v. Ganias, 417 Mass. 666 (1994). Here, the plaintiff, a 19-year-old who was legally an adult, but not legally able to purchase alcoholic beverages, became intoxicated by the voluntary consumption of alcohol and was subsequently injured while operating a motor vehicle. The court noted that while a social host may be liable to a third person injured by the negligence of an intoxicated guest, the host is not liable for an intoxicated guest who injures himself. In Makynen v. Mustakangas, 39 Mass. App. Ct. 309 (1995), a finding of liability on the part of a social host for service of extensive alcoholic beverages to his nephew who later operated a motor vehicle and injured the plaintiff, was upheld. Here, the nephew had consumed several beers at the defendant uncle's home before they went to obtain some take-out food. While waiting for the food, the uncle purchased additional beer from the commercial vendor for his nephew. However, the nephew was not displaying signs of obvious intoxication at the premises of the commercial vendor. The defendant, having been in the company of his nephew for several hours and observing him consuming a considerable number of beers, should have realized it was inappropriate for the nephew

to operate a motor vehicle and was held responsible to the parties injured as a result of the collision. The commercial vendor was found not liable.

In the case of Pollard v. Powers, 50 Mass. App. Ct. 151 (2000), involved a claim against an 18-year-old who hosted a birthday party at the house where she and her mother resided. While the initial guest list was small, predictably hordes of teenagers gathered and there was excessive drinking. The defendant also made arrangements for the availability of kegs of beer. Hostilities ensued and one of the guests assaulted another. The court pointed out that in many social host liability cases involving service of alcoholic beverages, harm arises out of a criminal act, be it driving under the influence or an assault. Here, because the teenage host provided the alcoholic beverages, liability was found.

Of interest is the case of Panagakos v. Walsh, 434 Mass. 353 (2001). This was an action for contribution by a tavern owner against the companions of an 18-year-old decedent who after becoming intoxicated was struck and killed walking on a roadway. The defendant companions, also teenagers, furnished the decedent with falsified identification and also purchased from the commercial vendor alcohol for the decedent's consumption. The tavern operator, having been sued by the decedent's estate claimed that the companions were equally culpable for his death. They were enablers in the decedent becoming intoxicated. Because the decedent, while an underage drinker, was 18 years of age and thus an adult, the companions could not be held liable for injuries which he inflicted upon himself as a result of voluntary intoxication. Despite the devious manner in which they assisted the decedent in becoming intoxicated, the companions could not be held liable to his estate and therefore could not be compelled to contribute to any judgment or settlement with respect to the claim against the tavern.

In the decision of Samson v. MacDougall, 60 Mass. App. Ct. 394 (2004), the defendants hosted a graduation party attracting a mix of teenagers and adults. Kegs of beer were provided. The plaintiff was rendered quadriplegic as a result of jumping from a wall after he became intoxicated. Having attained his 18th birthday, he was an adult

but was not by law able to purchase alcoholic beverages. Recovery was denied on the basis that a "social host has no duty to a guest who becomes intoxicated and injures himself where the guest, although under the minimum drinking age, was not a minor." Id. at 398. Reference is made to the Panagakos decision which stood for the proposition that social companions who provide alcoholic beverages directly, or enable a person to become voluntarily intoxicated, do not owe the drinker an ongoing duty of care. However, had the drinker injured a third party, liability would be feasible.

It is apparent from a review of the decisions involving social host liability that they are held to a lesser standard of care than a commercial vendor. Unless the drinker is a minor, the social host owes not duty of care to one who become voluntarily intoxicated and injures himself. A social host owes no duty of care to an adult, but underage, drinker (18 to 21 years) who voluntarily becomes intoxicated and injuries himself. Nunez v. Carrabba, 448 Mass. 170 (2007). The social host would only be liable in the situation of an adult drinker if he furnished alcoholic beverages to a guest who in turn caused foreseeable injury to a third party. Paying for alcoholic beverages consumed by another and dispensed by a commercial vendor does not make the payor a social host and responsible for injuries caused others by the drinker's intoxication and operation of an automobile. Dube v. Lamphear, 69 Mass. App. Ct. 386 (2007). While the defendant paid for the alcoholic beverages, he did not regulate the liquor supply.

VII. LIABILITY OF A PARTY WHO ENABLES THE EXCESSIVE CONSUMPTION OF ALCOHOLIC BEVERAGES BUT DOES NOT PROVIDE THEM

In the landmark decision of Commerce Insurance Company v. Ultimate Livery Service, Inc., 452 Mass. 639 (2008) the SJC affirmed a decision against a limousine service for injuries and death caused to third parties by its customer. The defendant transported a group of men who initially gathered at a bar for a bachelor's party at a strip club where additional alcoholic beverages were consumed. The livery driver permitted the consumption of alcoholic beverages purchased by the customers in the

vehicle. At the conclusion of the festivities, the defendant deposited its customers back at the bar where they had originally gathered, long after closing, with only the customers personal vehicles available to transport them to their respective homes. Despite the fact that the limousine service had not provided the alcoholic beverages, the court affirmed liability.

VIII. OBSERVATIONS

1. Liability most often pivots on whether there has been an actual distribution, by sale or gratuitously, of an alcoholic beverage. Mere ownership of the premises when the liquor is consumed and/or the accident occurs will usually not support a finding of liability

2. Distribution of alcoholic beverages to a minor who hurts himself or others will almost certainly result in a finding of liability even in the absence of "hand to hand" service.

3. The only protection available to a commercial vendor accused of distributing alcoholic beverages to a minor is to record the name, address and driver's license number or liquor identification card number upon a sale to a youthful customer.

4. If an employer elects to host or sponsor a social gathering of employees, it is prudent to engage an independent concessionaire to handle distribution of alcoholic beverages and, if possible, segregate the employer's financial support to non-alcoholic items such as food or awards, etc.

5. A commercial vendor is held to a higher standard of care with respect to distribution of alcoholic beverages because it has the experience, ability to control and the wherewithal to procure liquor liability insurance.

6. The key to liability with respect to service of alcoholic beverages to an adult who is harmed, or who harms others, is whether the consumer appeared intoxicated at the time of the sale with an acknowledgement that people react differently to alcoholic beverages; time is required for the beverages to have their effect; and the atmosphere or environment may or may not be conducive to a detection of intoxication. Liability is a "crap shoot", often dependent on the testimony of bystanders, friends of the plaintiff, friends of the drinker, all of which is obviously subjective.

7. Expert evidence, given a proper factual foundation, involving the interpretation of the drinker's blood alcohol as to what manifestations of intoxication the drinker would have made at the time of service may be admissible, but will not be dispositive of liability.

8. Liquor servers should never consume alcoholic beverages while on duty, and should be subject to background checks prior to hiring.

9. While in a relatively sedate, uncrowded environment, a liquor server may elect to count the number of drinks served to a customer. This method of attempting to gauge the state of a drinker's intoxication in a loud, crowded environment with multiple servers is wholly impractical.

10. If a purveyor of alcoholic beverages decides to adopt a formal policy authored by himself or adopted from a third party (i.e., industry group guidelines), he should be sure not to set the bar too high. A violation of one's own written policies for distribution of alcoholic beverages is strong evidence of negligence and is likely to result in a liability finding. The same caution should apply to compelling servers to take instruction for a third party whose materials may hold a server to impossibly high standards of vigilance.

11. Servers should be instructed that a refusal to sell because of a drinker's perceived intoxication may result in a modest loss of revenue, but will certainly aid in avoiding liability claims and enhance the tavern's reputation in the community.

12. In both a commercial setting and a private home where alcoholic beverages are being served, a call to 911 on evidence of escalating hostilities is seldom unwarranted.